

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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FIBER TECHNOLOGIES)	
NETWORKS, L.L.C.,)	
Complainant)	
)	
v.)	D.T.E. 01-70
)	
SHREWSBURY'S ELECTRIC)	
LIGHT PLANT,)	
Respondent)	
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RESPONSE OF SHREWSBURY'S ELECTRIC LIGHT PLANT

Pursuant to 220 C.M.R. 45.05, the Respondent Shrewsbury's Electric Light Plant ("SELP") hereby responds to the Complaint of Fiber Technologies Networks, L.L.C. ("Fibertech") as follows:

1. Paragraph 1 requires no response as it constitutes a characterization of the nature of the Complaint. Further, the allegations in Paragraph 1 state conclusions of law for which no response is required. To the extent a response is required, SELP does not contest the characterization of the nature of the Complaint.

2. This paragraph calls for a conclusion of law and therefore no response is required. To the extent that a response is required, SELP denies the allegations of Paragraph 2, and avers that a justiciable controversy exists concerning whether Fibertech is entitled to attach fiber to SELP's poles pursuant to G.L. c. 166, § 25A and 220 C.M.R. 45.00. SELP further avers that a justiciable controversy exists concerning whether SELP is required by law to even respond to Fibertech's pole attachment request, since Fibertech is not a "licensee" within the meaning of G.L. c. 166, § 25A and 220 C.M.R. 45.02, and Fibertech's dark fiber is not an "attachment" within the meaning of G.L. c. 166,

§ 25A and 220 C.M.R. 45.02. Further answering, SELP avers that there is a justiciable controversy whether Fibertech can be a “licensee” since it is not a company incorporated for the transmission of intelligence by electricity or telephone under G.L. c. 166, § 21 and therefore Fibertech cannot seek permission from the Town Board of Selectmen to construct lines in, over or under the public way pursuant to G.L. c. 166, § 22.

3. Paragraph 3 is a request for relief that requires no response. To the extent a response is required, SELP denies that the Department of Telecommunications and Energy (“DTE”) has jurisdiction to grant the relief requested by Fibertech on the basis that Fibertech cannot utilize the provisions of G.L. c. 166, §25A and 220 C.M.R. 45.00.

4. SELP is without knowledge or information sufficient to form a belief as to the truth of the matters alleged in Paragraph 4, except as to the statement that “Fibertech is a telecommunications service provider,” which SELP denies.

5. through 6. SELP admits the allegations of Paragraphs 5 and 6.

7. SELP denies the allegations of the first sentence of Paragraph 7. Future answering, SELP avers that it owns the poles on which Fibertech seeks to attach. SELP admits the allegations of the second sentence of Paragraph 7.

8. This paragraph calls for a conclusion of law and therefore no response is required. To the extent a response is required, SELP denies the allegations of Paragraph 8. Further answering, Fibertech will offer leases of its dark fiber to providers on a one-on-one contract basis, meaning that it is not a “common carrier” under any interpretation of that term. Indeed, Fibertech concedes that it holds itself out as a “carrier’s carrier.” See e.g., Fibertech Mission Statement at www.fibertech.com.

9. SELP admits the allegations of Paragraph 9. Further answering, SELP avers that Fibertech never made a written request referencing G.L. c. 166, § 25A or 220 C.M.R. 45.00 et seq. and represented itself to SELP as a company **that was not** incorporated for the transmission of intelligence by electricity or telephone, or cable television signals (Fibertech Complaint, Exhibit B.)

10. This paragraph calls for a conclusion of law and therefore no response is required. To the extent a response is required, SELP denies the allegations of Paragraph 10.

11. SELP denies the allegations of the first sentence of Paragraph 11. Further answering, SELP avers that Fibertech used to do business under the name “White Knight Fiber Systems,” and made its first request to SELP on or about June 27, 2000 (Exhibit A.) SELP also denies the allegations of the second sentence of Paragraph 11. SELP avers that it in fact allows “licensees” as required under G.L. c. 166, § 25A on its poles and neither White Knight nor Fibertech is, or ever was, a “licensee” within the meaning of G.L. c. 166, § 25A and 220 C.M.R. 45.02. SELP avers that Fibertech has quoted SELP’s General Manager Thomas Josie out of context, further answering that Mr. Josie explained to Ms. Starks sometime in September of 2000 that as the custodian of a public asset – SELP’s poles – SELP would seek the maximum value for the use of that asset within the limits of the law, and that there was nothing in White Knight or Fibertech’s request that would benefit SELP and the public interest. The allegations in the last sentence of Paragraph 11 refer to a written document which speaks for itself. SELP denies all allegations at variance with the text of the document.

12. SELP admits only that a letter was sent on October 2, 2000. The remaining allegations in Paragraph 12 refer to a written document which speaks for itself. SELP denies all allegations at variance with the written text of that document.

13. SELP admits the allegations in the first sentence of Paragraph 13. SELP denies the remaining allegations of Paragraph 13. Further answering, SELP avers that it in fact allows “licensees” as required under G.L. c. 166, § 25A on its poles and that there is a justiciable controversy whether Fibertech is a “licensee” within the meaning of G.L. c. 166, § 25A and 220 C.M.R. 45.02. Further answering, Mr. Josie explained to Ms. Starks that as the custodian of a public asset – SELP’s poles – SELP would seek the maximum value for the use of the asset within the limits of the law, and that there was nothing in Fibertech’s request that would benefit SELP and the public interest. The allegations in the last sentence of Paragraph 13 refer to a written document which speaks for itself. SELP denies all allegations at variance with the text of that document.

14. SELP denies the allegations contained in the first sentence of Paragraph 14. SELP admits the remaining allegations of Paragraph 14.

15. The allegations of Paragraph 15 refer to a written document which speaks for itself. SELP denies all allegation at variance with the text of that document.

16. SELP admits that a conversation occurred on or about May 15, 2001, but denies Fibertech’s characterization of Mr. Josie’s statements. The remaining allegations of Paragraph 16 refer to a written document which speaks for itself. SELP denies all remaining allegations at variance with the written text of that document.

17. SELP admits the allegations of Paragraph 17.

18. The allegations of Paragraph 18 refer to a written document which speaks for itself. SELP denies all allegation at variance with the text of that document.

19. SELP admits only that it sent a letter to Fibertech on July 19, 2001. The remaining allegations refer to a written document which speaks for itself. SELP denies all remaining allegations at

variance with the written text of that document and specifically denies the allegations of the last sentence of Paragraph 19.

20. SELP admits the allegations contained in the first sentence of Paragraph 20. SELP is without knowledge or information sufficient to form a belief as to the truth of the remainder of the matters alleged in Paragraph 20.

21. This paragraph calls for a conclusion of law and therefore no response is required. To the extent that a response is required, SELP denies the allegations of this paragraph as they pertain to Fibertech, and avers that a justiciable controversy exists concerning whether SELP is required by law to even respond to Fibertech's pole attachment request, since Fibertech is not a "licensee" within the meaning of G.L. c. 166, § 25A and 220 C.M.R. 45.02, and Fibertech's dark fiber is not an "attachment" within the meaning of G.L. c. 166, § 25A and 220 C.M.R. 45.02.

22. This paragraph calls for a conclusion of law and therefore no response is required. To the extent that a response is required, SELP denies the allegations of this paragraph as it pertains to Fibertech, and further answering, avers that Fibertech is not a "telecommunications" or cable television provider and is not competing for customers with any other "telecommunications" or cable television provider.

23. This paragraph calls for a conclusion of law and therefore no response is required. To the extent that a response is required, SELP denies that the Massachusetts pole attachment statute and the DTE's order apply to Fibertech.

24. This paragraph calls for a conclusion of law and therefore no response is required. To the extent that a response is required, SELP denies that Section 25A and the DTE's order have any application to Fibertech.

25. This paragraph calls for a conclusion of law and therefore no response is required. To the extent that a response is required, SELP denies that G.L. c. 166, § 25A, the DTE's order and the regulations at 220 C.M.R. 45.00 et seq. apply to Fibertech.

26. This paragraph calls for a conclusion of law and therefore no response is required. To the extent that a response is required, SELP denies that G.L. c. 166, § 25A, the DTE's order and 220 C.M.R. 45.00 et seq. apply to Fibertech.

27. This paragraph calls for a conclusion of law and therefore no response is required. To the extent that a response is required, SELP denies the allegations of Paragraph 27 as they apply to Fibertech. Further answering, SELP avers that the allegation that "SELP will compete with the services *offered over the facilities* Fibertech will install if given access to SELP's poles [emphasis added]" demonstrates that a justiciable controversy exists regarding whether Fibertech can utilize the provisions of G.L. c. 166, § 25A and 200 C.M.R. 45.00, since Fibertech will not be providing any service itself. Further answering, SELP avers that Mr. Josie specifically asked Fibertech whether it was transmitting intelligence by telephone or electricity, or cable television signals, and Fibertech confirmed that it was not.

28. This paragraph calls for a conclusion of law and therefore no response is required. To the extent a response is required, SELP denies the allegations of Paragraph 28. Further answering, SELP specifically denies that Fibertech's business of leasing dark fiber constitutes a "telecommunications service" or that Fibertech actually "transmits" intelligence by telephone or electricity. Further answering, SELP avers that the Global Naps cases regarding "dark fiber" and Section 271 of the Telecommunications Act of 1996 are irrelevant to the instant matter. Further answering, SELP avers that a justiciable controversy exists regarding the legality of Fibertech's

“application” to the DTE to seek authority to provide “local exchange service, interexchange service and data service,” for the sole purpose of attempting to be categorized as a company incorporated for the transmission of intelligence by electricity or by telephone, so that it could utilize the provisions of G.L. c. 166, § 25A and 220 C.M.R. 45.00 to gain access to SELP’s poles, without actually ever providing any competing services to customers.

29. SELP denies the allegations of Paragraph 29.

30. This paragraph calls for a conclusion of law and therefore no response is required. To the extent that a response is required, SELP admits that the definition of “attachment” quoted by Fibertech exists at G.L. c. 166, § 25A and 220 C.M.R. 45.02. Further answering, SELP avers that the concept of “overlapping” by cable system operators is irrelevant to the instant matter, and submits that it is unclear why Fibertech has raised this issue. SELP denies the remainder of the allegations of Paragraph 30.

31. through 31A. SELP denies the allegations of Paragraphs 31. Paragraph 31A calls for a conclusion of law and therefore no response is required. (SELP notes that there are two paragraphs marked as “31” in the Complaint. For the purposes of this answer, SELP designates the second Paragraph 31 as “31A.”) To the extent a response is required to Paragraph 31A, SELP denies that the DTE’s regulations apply to Fibertech.

32. through 33. SELP denies the allegations of Paragraphs 32 through 33. Further answering, SELP avers that in order to be a “licensee” for the purposes of G.L. c. 166, § 25A, Fibertech must be a company licensed to construct lines in the public way. Further answering, SELP avers that in order for Fibertech to be licensed to construct lines in the public way, it must seek grants of location (“GOL”) from the Board of Selectmen in Shrewsbury pursuant to G.L. c. 166, § 22. Further

answering, SELP avers that there is a justiciable controversy whether Fibertech can apply for GOL under G.L. c. 164, § 22 since it is not a company incorporated for the transmission of intelligence by electricity or telephone pursuant to G.L. c. 166, § 21.

34. Paragraph 34 consists of prayers for relief requiring no response. To the extent that a response is required, SELP denies the allegations of Paragraph 34.

Further answering, SELP alleges as follows:

1. SELP is a utility, as that term is defined by 220 C.M.R. 45.02 and G.L. c. 166, § 25A. As such, SELP may deny access to its poles to entities that are not “licensees” within the meaning of that statute and those regulations. G.L. c. 166, § 25A; 220 C.M.R. 45.02. SELP may also refuse to permit items that are not “attachments” within the meaning of G.L. c. 166, § 25A and 220 C.M.R. 45.02 to be installed on its poles.

2. Indeed, SELP has an obligation to its ratepayers and the citizens of the Town of Shrewsbury to deny access to its poles to ineligible applicants and to any systems not entitled by law to access or attach to its poles. SELP’s poles and rights-of-way represent a limited resource that was acquired and paid for by its ratepayers and the citizens of the Town of Shrewsbury, and SELP is the custodian of that limited, public resource. SELP cannot permit those entities who, by statute, are not entitled to attach wires and other items to their poles, because it would be permitting the misappropriation of an important, limited, public resource. Accordingly, SELP must avoid granting access to entities other than those intended to benefit from the provisions of G.L. c. 166, § 25A and regulations promulgated thereunder, such as cable television systems and bona fide telecommunications service providers.

3. Further, once SELP grants access to its poles to companies not entitled by law to attach, it would have to grant all other companies non-discriminatory access, even if those other companies were not entitled by law to attach. The result would be that taller and taller poles -- at great expense to aesthetics and public convenience -- would have to be constructed to accommodate the burgeoning number of attachments sought by companies who do not serve the residents of the Town of Shrewsbury, and who have no actual telecommunications service customers anywhere in the Commonwealth. The drafters of G.L. c. 166, § 25A did not anticipate that companies that actually do not provide services in competition with other providers, to consumers directly, would also seek to use this statute for access to utility poles. Otherwise, they would not have bothered to define “who” can attach “what” to utility poles in the statute. SELP submits that any sweeping policy matters, such as opening poles to all, must be handled through legislative change to G.L. c. 166.

4. The instant case presents several justiciable controversies. First, Fibertech has repeatedly characterized itself as a “dark fiber” company. “Dark fiber” means fiber that is not connected to any equipment capable of transmitting information. Thus, Fibertech, is not a company that is incorporated for the transmission of intelligence by electricity or telephone. As such, it is not permitted to petition Town officials for GOL under G.L. c. 166, §§ 21 or 22, or to pursue access to SELP’s poles pursuant to G.L. c. 166, § 25A and 220 C.M.R. 45.00 et seq., or seek relief from the Department for SELP’s refusal to grant it access to its poles.

5. While Fibertech alleges that it now intends (which it previously did not, nor did it indicate so), at some undetermined point in the future, to provide actual local exchange, long distance and similar services to end users, “[a]s market conditions and economics dictate,” it currently does not

provide services to any consumer end-user in the Commonwealth and its dark fiber is not capable of transmitting intelligence by electricity or telephone, or cable television signals. Complaint, ¶ 4.

6. Because Fibertech currently does not transmit intelligence by electricity or telephone, or cable television service, to any customer in Massachusetts, there is a justiciable controversy as to whether Fibertech can be a “licensee” regardless of sham intentions to someday provide actual services to consumers, and there is a justiciable controversy as to whether its dark fiber is an “attachment” within the meaning of G.L. c. 166, § 25A and 220 C.M.R. 45.02.

7. Under the Pole Attachment statute and the DTE’s regulations, an “attachment” is a “wire or cable for transmission of intelligence by...telephone or television...” E.g., 220 C.M.R. 45.02. According to the DTE, the purpose of its pole attachment regulations is to effect “legislative policy in favor of competition and consumer choice in telecommunications...to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to poles...” 220 C.M.R. 45.01. Fibertech is not a “carrier” since it has no tariff for dark fiber leasing and does not offer its dark fiber “service” to the general public. Fibertech’s dark fiber is not a telecommunications service because unlighted fiber such as Fibertech’s is incapable of transmitting anything. Embedded in both federal and state concepts of telecommunications is “transmission.” E.g., 220 C.M.R. 45.02. Leasing bare capacity – which is currently Fibertech’s stated business purpose -- is not a telecommunications service. S.Rep.No. 103-367, 103d Cong.2d.Sess. 56 (1994). Dark fiber “is not a service at all...” Gulf Power Co. v. FCC, 208 F.3d 1263, 1266, n. 2 (11th Cir. 2000.)

8. Accordingly, Fibertech is not a “licensee,” and its dark fiber is not an “attachment” under G.L. c. 166, § 25A and 220 C.M.R. 45.02 . The Department would not have jurisdiction to

entertain a pole attachment complaint by a company that is not a “licensee” and that proposes to place wire that is not an “attachment” on SELP’s poles.

9. In short, Fibertech is not, and cannot be a “licensee,” and is only “intending” to offer local exchange and other services to actual consumers. As a result, Fibertech is merely a speculative developer of bare network capacity, seeking to co-opt limited pole space that should go only to bona fide telecommunications service and cable television providers, contrary to the Department’s intent to promote competition through implementation of its pole attachment regulations at 220 C.M.R. 45.00 et seq.

10. Based on the foregoing, SELP appropriately denied Fibertech’s request to attach its dark fiber to its poles.

11. SELP disagrees with Fibertech’s request for a hearing, and does not believe a hearing is necessary under 220 C.M.R. 45.05. SELP submits that the Department may decide this matter on the pleadings, discovery responses and briefs, since most of the issues involved in this matter are questions of law. SELP will provide any additional information and briefing on the issues to assist the Department’s investigation of this matter.

WHEREFORE,

SELP respectfully requests that the Department find that it does not have jurisdiction to entertain Fibertech’s complaint because Fibertech is not a “licensee” with rights to seek access to SELP’s poles and its dark fiber is not an “attachment” within the meaning of G.L. c. 166, § 25A and 220 C.M.R. 45.00 et seq. In the alternative, if the Department determines that it does in fact have jurisdiction to entertain Fibertech’s complaint, SELP requests that the Department find that Fibertech is not a “licensee” and its dark fiber is not an “attachment” within the meaning of G.L. c. 166, § 25A and 220

C.M.R. 45.00 et seq., and that therefore it is not entitled to avail itself of the protections of that statute and those regulations.

Respectfully submitted,

SHREWSBURY'S ELECTRIC
LIGHT PLANT

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